

SERVICE DATE—FEBRUARY 4, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 346X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
LAKE COUNTY, IND.

Digest:¹ This decision allows Norfolk Southern Railway Company to end its common carrier obligation to provide freight rail service over a 2.95-mile line of railroad in Lake County, Ind.

Decided: February 3, 2014

By petition filed on October 22, 2013, Norfolk Southern Railway Company (NSR) seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon approximately 2.95 miles of railroad between milepost MQ 280.15 (near the intersection of Lincoln Highway and Junction Avenue in the City of Schererville, Ind.) and milepost MQ 283.10 (near the line's crossing of E 53rd Avenue/Main Street, which is proximate to the border of the Town of Munster and the City of Schererville), in Lake County, Ind. (the Line). The Line traverses United States Postal Zip Codes 46321 and 46375, and includes the station of Schererville.² Notice of the petition was served and published in the Federal Register on November 8, 2013 (78 Fed. Reg. 67,216).

For the reasons discussed below, the Board will grant the exemption from 49 U.S.C. § 10903, thereby authorizing NSR to abandon the Line, subject to environmental and standard employee protective conditions.

BACKGROUND

NSR states that the Line was originally constructed by the Pittsburgh, Cincinnati, Chicago, and St. Louis Railroad (PCC&StL), which was leased by the Pennsylvania Railroad (PRR) in 1921 and merged with the PRR subsidiary Philadelphia, Baltimore and Washington Railroad in 1956. According to NSR, PRR then combined with the New York Central Railroad to form

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² NSR states that the station of Schererville will not be closed due to other NSR lines that will remain in place that also serve this station. NSR Pet. Ex. D.

Penn Central Transportation Company (Penn Central) in 1968. Thereafter, Consolidated Rail Corporation assumed control of the Line following the bankruptcy of Penn Central. NSR states that it assumed control of the Line in 1999.³

According to NSR, it has elected to seek an exemption to permit abandonment of the Line because: (1) the Line is no longer needed and is out of service; (2) the only shipper that NSR served via the Line receives direct rail service from another railroad and has also retained access to NSR line-haul service; and (3) removal of the Line would reduce complexity in rail operations by removing unnecessary and costly-to-maintain track infrastructure in an already rail-dense area of Northwestern Indiana that is part of the greater Chicago/Gary, Ind., metropolitan area.

NSR asserts that only one active shipper, Midwest Pipe Coating, Inc. (Midwest), has, until recently, received service via the Line. NSR states, however, that as of March 2013, NSR reached an agreement with Wisconsin Central Limited (WCL),⁴ a subsidiary of Canadian National Railway Company, whereby WCL now provides direct service to Midwest. According to NSR, the agreement between NSR and WCL provides that Midwest will retain access to NSR line-haul service under the terms of an NSR-WCL switching agreement. Accordingly, NSR states that no shipper would lose access to rail service, including access to NSR line-haul service, as a result of the proposed abandonment.

Additionally, NSR states that the Line crosses another NSR line (the east-west-oriented Hartsdale Industrial Track) at an at-grade diamond near the Line's southeastern terminus. NSR states that, just southeast of the diamond, the Line passes beneath NSR's north-south-oriented Kankakee Line. As a result of the proposed abandonment, NSR asserts that it would remove the diamond at the Hartsdale Industrial Track and fill in beneath the Kankakee Line overpass. NSR argues that these proposed changes would relieve NSR of the burdens associated with the costly upkeep of supporting such infrastructure that would be rendered unnecessary by the Line's abandonment.

In sum, NSR states that the proposed abandonment would be a step toward improving rail network efficiency in the Chicago/Northwestern Indiana region, and no shipper would lose access to direct rail service. No shippers or other entities filed comments in response to the petition.

³ See CSX Corp. & CSX Transp., Norfolk S. Corp. & Norfolk S. Ry.—Control & Operating Leases/Agreements—Conrail Inc. & Consol. Rail Corp., FD 33388 (STB served July 23, 1998).

⁴ NSR states that WCL operates a rail line that is adjacent to the Line in the vicinity of Midwest's plant.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without prior approval from the Board. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Here, detailed scrutiny of the proposed abandonment under 49 U.S.C. § 10903 is not necessary to carry out the rail transportation policy (RTP). The Line is not currently in operation and there has been no freight rail traffic on the Line since March 2013. Since that time, the only shipper that could receive service via the Line, Midwest, has received direct rail service from WCL, which operates a rail line adjacent to the Line. Further, pursuant to the agreement between NSR and WCL, Midwest retains access to NSR line-haul service under the terms of an NSR-WCL switching agreement. By receiving a grant of abandonment, NSR would avoid unnecessary maintenance costs by removing unneeded trackage and a costly-to-maintain diamond crossing. By minimizing the administrative expense of the application process, an exemption would minimize the need for Federal regulatory control over the rail transportation system and would reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). An exemption, therefore, would also foster sound economic conditions and encourage efficient management by permitting the rationalization of an unnecessary common carrier rail line, consistent with 49 U.S.C. §§ 10101(5) and (9). Other aspects of the RTP will not be adversely affected by the use of the exemption process.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because there are no active shippers on the Line.⁵ Further, no shipper or other party has filed in opposition to the proposed abandonment. Nevertheless, to ensure that Midwest is informed of our action, we will require NSR to serve a copy of this decision on Midwest so that it is received by the shipper within 5 days of its service date and to certify contemporaneously to the Board that it has done so.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose the employee protective conditions set forth in Oregon Short Line—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

⁵ Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Environmental Review. NSR has submitted a combined environmental and historic report and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the environmental and historical report, verified NSR's data, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA issued an Environmental Assessment (EA) in this proceeding on November 15, 2013, recommending that several conditions be imposed on any decision granting abandonment authority.

In the EA, OEA states that the Indiana Department of Natural Resources (IDNR), Division of Nature Preserves submitted comments identifying three ecological communities of state concern located within the Hoosier Prairie State Nature Preserve (Hoosier Prairie), an approximately 750-acre protected area owned by IDNR. According to IDNR, the ecological communities of concern are the wet-mesic sand prairie, sedge meadow, and mesic sand prairie communities. IDNR recommends that NSR be prohibited from stockpiling materials or allowing parking in areas containing these communities during salvage activities. Accordingly, OEA recommends a condition requiring NSR to consult with IDNR regarding the use of mitigation measures to prevent potential impacts to Hoosier Prairie and to comply with that agency's reasonable recommendations.

OEA further states that, based on its review of available geospatial data, the Line appears to cross one stream, and portions of the Line appear to be adjacent to areas containing wetlands. OEA states that IDNR submitted comments stating that its review of aerial photographs and topographical maps also indicate that the Line crosses one stream.⁶ According to OEA, NSR requested comments from the Indiana Department of Environmental Management (IDEM) regarding potential impacts to water quality, but has received no response to date.

OEA states in the EA that IDNR recommends a number of potential mitigation measures to avoid impacts to waterways and wetlands. According to OEA, IDNR recommends that NSR consult with IDEM regarding potential impacts to waterways and wetlands. Thus, OEA recommends a condition requiring NSR to consult with IDNR and IDEM regarding the use of mitigation measures to prevent potential impacts to waterways and wetlands and to comply with those agencies' reasonable recommendations.

In the EA, OEA notes that the National Geodetic Survey (NGS) had not submitted comments regarding the potential impact of the proposed abandonment on any geodetic station markers that may be present in the project area. Accordingly, OEA recommends a condition requiring NSR to consult with NGS prior to commencing salvage activities.

⁶ According to NSR, the referenced stream is conveyed under the Line through a culvert.

Also in the EA, OEA notes that the IDNR, Division of Historic Preservation and Archaeology (State Historic Preservation Officer or SHPO) submitted comments on the proposed abandonment stating that one archaeological site is located within the proposed project area. The SHPO notes that, because salvage of the Line would not entail any digging, excavation, or removal of ballast, no archaeological investigations would be necessary. However, the SHPO states that, should archaeological artifacts or human remains be uncovered during salvage activities, NSR should report the discovery to the SHPO. Accordingly, OEA recommends a condition requiring NSR to cease work and notify the SHPO, OEA, and interested federally recognized tribes, if any, should archaeological artifacts or human remains be discovered during salvage activities.

Pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the National Park Service Native American Consultation Database to identify federally recognized tribes that may have ancestral connections to the project area. According to OEA, the Database indicated that there are four tribes that may have knowledge regarding properties of traditional religious and cultural significance within the right-of-way of the proposed abandonment. OEA sent a copy of the EA to these tribes for review and comment.⁷

Comments to the EA were due by December 16, 2013. During the comment period, NSR submitted comments clarifying that it has consulted with NGS regarding the presence of geodetic station markers in the project area. NSR submitted the results of these consultations, in which NGS states that two geodetic station markers are located near the rail right-of-way. NGS requests that NSR consult with NGS at least 90 days prior to beginning any salvage activities that would disturb or destroy either of these geodetic station markers. Accordingly, OEA recommends that the condition requiring NSR to consult with NGS be removed and recommends a new condition requiring NSR to notify NGS if salvage activities would disturb or destroy any geodetic station markers.

The conditions recommended by OEA both in the EA and in response to the comments filed after the EA will be imposed. Based on OEA's recommendations, the Board concludes that the proposed abandonment, if implemented as conditioned, would not significantly affect either the quality of the human environment or the conservation of energy resources.

⁷ The Database is at: <http://home.nps.gov/nacd/>. The identified tribes are the Citizen Potawatomi Nation in Oklahoma; the Forest County Potawatomi Community in Wisconsin; the Hannahville Indian Community in Michigan; and the Prairie Band of Potawatomi Nation in Kansas.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by NSR of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line—Abandonment—Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and the conditions that NSR shall: (1) consult with IDNR and IDEM regarding mitigation measures to prevent potential impacts to waterways and wetlands prior to the commencement of any salvage activities and comply with those agencies' reasonable recommendations; (2) consult with IDNR regarding mitigation measures to prevent potential impacts to Hoosier Prairie prior to the commencement of any salvage activities and comply with that agency's reasonable recommendations; (3) notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers in order to plan for the possible relocation of the geodetic station markers by NGS; and (4) immediately cease all work and notify OEA, interested federally recognized tribes, and the SHPO in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities. OEA shall then consult with the SHPO, interested federally recognized tribes, NSR, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

2. NSR is directed to serve a copy of this decision on Midwest so that it is received within five days of this decision's service date and to certify contemporaneously to the Board that it has done so.

3. An Offer of Financial Assistance (OFA) under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by February 14, 2014, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,600. See 49 C.F.R. § 1002.2(f)(25).

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

5. Provided no OFA has been received, this exemption will be effective on March 6, 2014.

6. Petitions to stay must be filed by February 19, 2014. Petitions to reopen must be filed by March 3, 2014.

7. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), NSR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by NSR's filing of a notice of consummation by February 4, 2015, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott and Vice Chairman Begeman.